

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF NEW YORK

3 JAMES BENBOW, . Docket No.
 4 Plaintiff, . 1:17-cv-06457-EK-JRC
 5 v. . Brooklyn, New York
 6 OFFICER BRIAN W. FEELY, ET . Monday, July 25, 2022
 7 AL., .
 8 Defendants. .

9
 10 TRANSCRIPT OF MOTION HEARING
 11 BEFORE THE HONORABLE JAMES R. CHO
 UNITED STATES MAGISTRATE JUDGE

12 APPEARANCES:

13 For the Plaintiff: The Aboushi Law Firm
 14 AYMEN A. ABOUSHI, ESQ.
 15 1441 Broadway
 Fifth Floor
 New York, New York 10018
 212-391-8500

16 For the Defendants: New York City Law Department
 17 Special Federal Litigation
 18 Division
 ZACHARY KALMBACH, ESQ.
 100 Church Street
 Suite 3-228
 19 New York, New York 10007
 212-356-2322

21 Transcription Service: Superior Reporting Services LLC
 22 P.O. Box 5032
 23 Maryville, TN 37802
 865-344-3150

24 Proceedings recorded by electronic sound recording;
 25 transcript produced by transcription service.

P R O C E E D I N G S

THE COURT: Good afternoon, everyone. We're here for a hearing on Defendant's motion for summary judgment in Benbow versus Feely, case number 17-cv-6457. Can the parties state their appearances for the record starting with Plaintiff?

MR. ABOUSHI: Good afternoon, Your Honor. Aymen Aboushi on behalf of the Plaintiff.

MR. KALMBACH: And Zachary Kalmbach from Corporation Counsel on behalf of Defendants.

THE COURT: All right. Good afternoon, everyone. And I do note for the record that parties -- or the Court did receive Docket Number 111, which was Plaintiff's submission, which was filed yesterday. All right. Mr. Kalmbach, this is your motion. Do you want to be heard?

MR. KALMBACH: Yes, Your Honor. Thank you. So as Your Honor is aware, Plaintiff filed this lawsuit alleging a number of claims, and I'll just address those claims in order.

First, Your Honor, Plaintiff alleges an excessive force claim against all of the Defendants. Centrally, his excessive force claim is against Officers Feely and Rosiello, who fired their -- or discharged their firearms in response to Plaintiff running with a firearm towards Detective Feely and refusing orders to drop his firearm. Now, really the

1 central issue is whether or not Plaintiff was holding a
2 firearm. Plaintiff denies that he was possessing a firearm
3 at the time, and the -- really, the motion turns on that
4 fact, Your Honor.

5 And even though Plaintiff now denies it, for
6 purposes of defeating our summary judgment motion, he under
7 oath during a plea allocution hearing admitted to, in fact,
8 possessing the firearm. The fact that this Plaintiff's
9 criminal case was thereafter dismissed or vacated has no
10 bearing on whether or not Plaintiff was actually possessing
11 that firearm. Here, the Court will take -- or should take
12 judicial notice of the fact that Plaintiff -- or Plaintiff's
13 testimony in the plea allocution hearing, he is now
14 judicially estopped from arguing otherwise.

15 And just to clarify, too, the Appellate Division's
16 reversal of Plaintiff's criminal case had to do with whether
17 there was reasonable suspicion to stop Plaintiff in the first
18 place. It doesn't have anything to do with whether Plaintiff
19 was actually possessing a firearm. So there's no genuine
20 dispute that Plaintiff was holding a firearm. Now, Plaintiff
21 now argues that he --

22 THE COURT: Well, let me stop you for a minute
23 there, Mr. Kalmbach. I want to be precise. So at the
24 allocution, he admitted to possessing the handgun, right?
25 What you just said was there's no dispute that he was holding

1 the handgun. I want to be precise, though. Do you have
2 evidence other than the testimony that I assume from your
3 officers that he was holding the gun, I don't think Plaintiff
4 ever admitted he was holding it. Or am I misreading the
5 record?

6 MR. KALMBACH: Well, to possess it, I believe he
7 would have to be holding it. I guess I'm not understanding
8 how --

9 THE COURT: Look, I think the argument you're
10 raising is that he had this gun in his hand and pointed it at
11 the officers, right?

12 MR. KALMBACH: Correct.

13 THE COURT: But if he had the gun in his back
14 pocket, that's a different story; isn't it?

15 MR. KALMBACH: Well --

16 THE COURT: All right. You can possess it, but it
17 can be in your back pocket. He's not pointing it at the
18 officers at that time, right? I just want to be precise
19 because -- unless you don't think we need to be that precise
20 in dealing with this motion, right? If he just had it on his
21 body, are you saying that's sufficient for defeating the
22 excessive force claim?

23 MR. KALMBACH: I think it would be sufficient for
24 at least on qualified immunity grounds to be running with a
25 firearm and the officer telling him to drop the firearm,

1 essentially, and -- but in any event, I don't think Plaintiff
2 in opposition argues whether or not -- so for -- Plaintiff
3 doesn't say, okay, well, he was holding -- or he possessed
4 the firearm but he wasn't holding it. That's not the
5 position Plaintiff's taking in opposition to our motion. His
6 position is that Plaintiff did not have a firearm at all,
7 which is really -- and because if he did possess the firearm,
8 now that's -- it's a different story because now we have our
9 officers who already testified that they saw him holding the
10 firearm.

11 THE COURT: Okay. So what you're saying though,
12 then, is the fact that Plaintiff is denying that he ever had
13 the firearm does not create a genuine issue of material fact.
14 Is that what you're saying?

15 MR. KALMBACH: Correct, Your Honor.

16 THE COURT: Even though your officers disagree?

17 MR. KALMBACH: Yes. But we think that Plaintiff,
18 his pre-allocation together with the fact that Plaintiff does
19 not argue in opposition that there's any distinction between
20 whether if he was possessing the firearm that it was in his
21 back pocket or anything like that warrants -- or means that
22 there's no genuine issue or fact that Plaintiff was holding
23 the firearm. And even assuming for the purposes of argument
24 that he possessed -- so say, in this hypothetical situation,
25 which -- again, there's kind of two situations here, one,

1 Plaintiff did not have the firearm or two, Plaintiff had the
2 firearm and was holding the firearm.

3 No party is arguing that there's anything in
4 between. But just for the sake of argument, if Plaintiff was
5 running at officers with a firearm, they would still be
6 entitled to qualified immunity on that -- on those grounds,
7 and also -- well, I'll leave it there on that point. And
8 then I do want to make more qualified immunity arguments
9 whenever the time's appropriate.

10 THE COURT: Understood.

11 MR. ABOUSHI: Your Honor, may (indiscernible), or
12 are you going to do it by --

13 THE COURT: Yeah. Mr. Aboushi, I will turn -- I
14 will give you plenty of opportunity to respond at the
15 appropriate time, but why don't we hear from Mr. Kalmbach
16 first.

17 MR. ABOUSHI: Thank you.

18 THE COURT: Mr. Kalmbach, since we're talking about
19 the allocution, is it your view -- I assume this is the
20 case -- that notwithstanding the Second Department's decision
21 that the court -- this Court should still take into account
22 his allocution. Is that your position?

23 MR. KALMBACH: Yes, Your Honor, based on the
24 doctrine of judicial estoppel and the fact that the Appellate
25 Division's reversal had nothing to do with whether Plaintiff,

1 in fact, possessed the firearm or did not possess the
2 firearm.

3 THE COURT: Understood. Does that also mean the
4 Court should take into account that Plaintiff is arguing he
5 was coerced and felt pressured to allocate the way he did --

6 MR. KALMBACH: Well, in his --

7 THE COURT: -- or --

8 MR. KALMBACH: A, there's no evidence of that.

9 Plaintiff says that -- in his 56.1 that his parents or
10 family -- I can't remember who -- was pleading with him to
11 take it, but there's no actual evidence of that that
12 Plaintiff cites to, and B, in the allocution, he actually
13 says under oath that he was not forced into taking this plea
14 agreement. And it's just, like, as a matter of policy being
15 able to say later in civil suits, oh, well, I was coerced,
16 when there's no actual evidence of that beyond just the fact
17 of taking a plea deal, which is a part of everyday criminal
18 process isn't -- I guess as a matter of policy doesn't really
19 make sense.

20 But in any event, he said under oath that he was
21 not forced into taking it. So our position is that the Court
22 should disregard Plaintiff's now convenient claims that he
23 was somehow coerced, which is a strong word considering what
24 Plaintiff's actual claims are in this case.

25 THE COURT: I understand that. But do you know,

1 then, why he appealed the judgment to the Second Department?

2 MR. KALMBACH: It was based on -- well, I guess I
3 don't have his moving papers but reading the Second
4 Department's opinion, which Plaintiff attaches to his motion,
5 it's the thrust -- actually not what the -- the whole opinion
6 is about whether -- and this is actually -- it looks -- seems
7 to be a mistake, but the Second Department really discusses
8 the standard for whether an anonymous tip can create
9 reasonable suspicion and then the issue was -- so the Court
10 found no in that case, and therefore, the firearm should've
11 been suppressed. So it was based on suppression, not
12 whether -- not actual possession.

13 THE COURT: I understand that. But if someone is
14 pleading guilty, why would they appeal, then? Because
15 they've already plead guilty.

16 MR. KALMBACH: I mean, maybe afterwards they talked
17 to a lawyer, who gave them a second opinion on something or
18 they talked to -- they went to the law library and found out
19 about -- read about reasonable suspicion. There's a plethora
20 of reasons why somebody would appeal and considering -- just
21 to, like, take another kind of crack at the apple if you
22 will -- but --

23 THE COURT: Okay. Or maybe he felt coerced into
24 pleading guilty and decided to appeal. Is that a possibility
25 as well?

1 MR. KALMBACH: It's just such extreme conjecture at
2 this point, Your Honor, when we have -- he testified under
3 oath that he was not forced into pleading guilty.

4 THE COURT: Understood. Okay. Go ahead.

5 MR. KALMBACH: And so under the forced claims as
6 well and also -- I'm not sure if Your Honor has viewed the
7 security cam footage, but it does show Plaintiff also
8 removing what appears to be a firearm from his waistband of
9 his pants.

10 THE COURT: Okay.

11 MR. KALMBACH: So Plaintiff, then, argues that, oh,
12 well, he was shot in the back, so he must have been running
13 away from the officers, whereas, if you actually look at the
14 photos of Plaintiff's injury, he was not actually shot
15 directly in the back. The location of his injuries is
16 consistent with the officer's testimony. But notwithstanding
17 that, Your Honor, Plaintiff's argument also is that, okay, so
18 I was running directly away from Officers Feely and Rosiello,
19 and he submits this report by his purported experts that
20 shows, like, an arrow purporting to be the direction that
21 Plaintiff was running. That direction where he was running
22 was directly where the other officers were standing; that's
23 not disputed here.

24 So under the objective qualified immunity standard,
25 it was, in that situation -- actually, even setting aside

1 qualified immunity, in that situation, it would still have
2 been objectively reasonable to fire at Plaintiff when he was
3 running towards fellow officers with a firearm, even if it
4 wasn't and the Court doesn't find that that was -- or does
5 find that that was -- by itself would've been excessive
6 force, here there's no clearly established law that in a
7 situation where an individual is running towards police
8 officers when in possession of a firearm, it is not
9 objectively reasonable to use lethal force on that person.

10 In fact, just a couple weeks after this motion was
11 fully briefed, the Supreme Court issued two more decisions
12 strongly reiterating that when viewing -- or when analyzing
13 qualified immunity, the analysis has to be very specific to
14 the facts. Any that is to be -- for the law to be clearly
15 established, the facts have to closely match up and the
16 Supreme Court repeatedly again and again instructs courts to
17 not define clearly established law at a level of generality
18 but rather to analyze the -- or to match up these specific
19 facts.

20 So at a minimum, our position is that the officers
21 were entitled to qualified immunity on the excessive force
22 claims. As to Plaintiff's excessive force claim against the
23 other Defendant, our position is that those claims are
24 abandoned. We argued that they were not personally involved;
25 they did not use force; that's Defendants Anderson, Minucci,

1 Diab, and Mitchell, so Plaintiff's excessive force claim
2 against those Defendants should be dismissed.

3 With regard to Plaintiff's false arrest claim, the
4 collective knowledge doctrine applies here. The proper
5 inquiry there is whether the arresting officer acted
6 reasonably as opposed to whether probable cause actually
7 existed or the vouching officer acted reasonably. Here,
8 there was a tip from Officer Marshall (ph.) that Plaintiff
9 possessed a firearm. At a minimum, even if that didn't rise
10 to the level of probable cause and is setting aside the fact
11 that Plaintiff has already under oath said that he did, in
12 fact, possess a firearm, which that by itself is enough to
13 defeat Plaintiff's false arrest claim.

14 But even setting that aside, the officers were
15 entitled to rely on the tip from Marshall and at a minimum,
16 that would provide the officers reasonable suspicion to stop
17 Plaintiff, and upon finding the firearm, at that point, there
18 was probable cause to arrest Plaintiff. That same analysis
19 applies to Plaintiff's malicious prosecution claim. Probable
20 cause also defeats such claims, and there's no evidence here
21 that the probable cause officiated between the time the
22 Plaintiff was arrested and arraigned.

23 Also, Plaintiff was indicted in this case. And
24 indictment creates a presumption of probable cause, and
25 Plaintiff has failed to overcome that, here. In addition,

1 Plaintiff has failed to satisfy the malice element of
2 malicious prosecution claims. So for those reasons -- and
3 again, this -- the central reason for why Defendant should be
4 granted summary judgment for Plaintiff's malicious
5 prosecution and false arrest claims is because he did, in
6 fact, possess the firearm, which is -- satisfies the element
7 of the crime by itself, so there was probable cause to arrest
8 him.

9 With regard to Plaintiff's failure to intervene
10 claim, our position is that it was impossible for the other
11 officers to intervene in the use of lethal force. Obviously,
12 Officers Feely and Rosiello can't intervene in their own uses
13 of force, so these claims are really against the other
14 officers. And based on where Plaintiff admits that their
15 positioning was, just based on the fact that there was only
16 a few shots fired and we can't expect the officers to somehow
17 jump in front of a bullet to stop this use of force,
18 Plaintiff's failure to intervene claims clearly fail.
19 Lastly --

20 THE COURT: Mr. Kalmbach, let me stop you for a
21 minute. I have a question regarding the failure to
22 intervene. Now, how long do you think the shooting took
23 place? Clarify your view. Is it 20 to 30 seconds, or is it
24 the 2 minutes? Is it the shorter or longer, or does it not
25 matter?

1 MR. KALMBACH: No. It was shorter. Our position
2 is that it was just a matter of seconds. And Officer Feely,
3 he said that there was -- in a testimony he mentioned the 20
4 to 30 seconds, which I believe was between the first and last
5 shot, if I'm remembering correctly. And even after that, he
6 said -- he clarified that it was a boom, boom, boom, and that
7 he had trouble estimating the times. Another officer who
8 testified said that it was just two or three seconds. So our
9 position is that it was shorter, but even if it was, it maxed
10 20 to 30 seconds.

11 But still based on where the other officers
12 would've been standing, based upon the intensity of a
13 situation which warrants lethal force and which lethal force
14 was used, it is just not practical for the officers to have
15 an opportunity, a realistic opportunity to actually stop the
16 force. But our position is when actually looking at Officer
17 Feely's testimony, it is a boom, boom, boom kind of situation
18 here.

19 THE COURT: Now, your friend on the other side says
20 it could have been a longer episode, almost two minutes,
21 right? You saw that argument, correct?

22 MR. KALMBACH: Yes. That just -- even if --

23 THE COURT: Now, let's assume that -- we're on
24 summary judgment, so let's assume it -- the duration of the
25 shooting was, in fact, two minutes. Would your failure to

1 intervene argument still stand? Assuming it were two
2 minutes, do you think you still have a valid failure to
3 intervene motion and you think -- and your position should be
4 that should still be dismissed, even if it were the longer
5 duration?

6 MR. KALMBACH: Yes. It would still be -- accepting
7 that premise, which I think, again, looking at the actual
8 evidence that that isn't possible. But accepting that
9 premise is true, there was still a very -- there wasn't -- I
10 think just practically for an officer to stop a gunshot is
11 just not practical. Again, Your Honor, it's a premise that
12 we just don't think is -- should be accepted in this case.

13 THE COURT: I understand that. But are you also
14 saying, then, given the location of Anderson, Diab, Minucci,
15 and Mitchell that even if it were two minutes, they weren't
16 in a position to be able to intervene. Is that your argument
17 or something else?

18 MR. KALMBACH: Yes, Your Honor. That would be
19 correct.

20 THE COURT: Okay. Is it because your view is that
21 they were not close enough to Feely and Rosiello to have done
22 anything? Is that your position?

23 MR. KALMBACH: Is that and -- these kind of failure
24 to intervene claims, Your Honor, they typically give rise in
25 a situation where -- for example, if there's -- if there's

1 like a continuous beating of a arrestee who's in handcuffs,
2 right? So there's a beating that allegedly goes on for say,
3 like, two minutes, that's a much different situation
4 where -- than here where the use of force is just a few gun
5 shots.

6 THE COURT: Okay. I hate to do this, but I have a
7 follow-up question on your excessive force claim. And maybe
8 I've mired in the weeds, so maybe I shouldn't, but let's
9 assume it's true what your -- what the Plaintiff is saying
10 now that he did not have a gun with him. He did not possess
11 a gun at that time. If that were the case, what happens to
12 the excessive force claim? If he did not have a gun, does
13 that mean any force used by your officers would have been
14 accepted or not necessarily, if he did not have the gun?

15 MR. KALMBACH: It would --

16 (Simultaneous speech)

17 THE COURT: Again, assuming his testimony that he
18 did not have a gun.

19 MR. KALMBACH: Yeah. If the Court accepts his
20 testimony that he did not have a gun as true --

21 THE COURT: Yeah.

22 MR. KALMBACH: -- it's a more difficult case for us
23 in that case, Your Honor.

24 THE COURT: I understand, okay, but I got to --

25 MR. KALMBACH: Yeah.

1 THE COURT: Okay. Understood. Go ahead. Anything
2 else?

3 MR. KALMBACH: The last point is on Plaintiff's
4 Monell claim. Many of his contentions on this claim as far
5 as, like, how many lawsuits there were, how many complaints
6 there were against the officers, things like that are just
7 wrong. They're just, like, not factually correct, even
8 looking at the evidence that Plaintiff cites. And it really
9 just boils down to the fact that a Monell claim can't be
10 premised on just a couple lawsuits and really can't be
11 premised on lawsuits that don't result in liability, which
12 here, there's no evidence that these officers were ever found
13 to be liable in a lawsuit.

14 And then, I guess I have -- I said one more but one
15 more after that is just Plaintiff's claim for assault and
16 battery and negligence also fail assault and battery for the
17 same reasons as Plaintiff's excessive force claim and
18 negligence because Plaintiff can't simultaneous assert
19 negligence and intentional conduct.

20 THE COURT: Okay. Mr. Aboushi, you've been very
21 patient. I'll hear from you now.

22 MR. ABOUSHI: Thank you, Your Honor. And if you
23 get to know me, you'll realize how hard that was. Thank you
24 for the opportunity, Your Honor. First and foremost, I want
25 to incorporate by reference our opposition and submissions

1 therein to this oral argument and the points raised. Diving
2 into the points raised by my colleague on the other side, I
3 think the Court astutely noted the difference between possess
4 and point, and I'd even take it one step further. There's
5 nothing in the, I would say, deficient allocution that says
6 he possessed it at that time or during his interactions with
7 these officers. And so the record before the Court mandates
8 that the Court deny the Defendant's summary judgment on this
9 particular issue especially in addition to the others.

10 And you know, taking a step back, Your Honor, the
11 Defendants only win this motion for summary judgment if you
12 flip the standard for summary judgment on its head and take
13 everything that they said is true and give them all
14 reasonable inferences, which we all know that's not what the
15 Court's supposed to do. So in nearly every argument made by
16 defense counsel, he's saying the facts say this and the fact
17 say that. And frankly, he didn't write the moving brief, but
18 when I read the moving brief, the term undisputed was used so
19 many times, I was flabbergasted because you can call this
20 record many things, Your Honor. One thing that you cannot
21 call it is undisputed, and only a jury can resolve these
22 issues.

23 So even assuming that the allocution is
24 valid -- and I'm going to get into that in a second -- or
25 that the guilty plea is valid -- and I'm going to get into

1 that in a second -- there's still too far a bridge between
2 allocating to possessing a gun and possessing a gun during an
3 incident, an encounter with police. And even going a step
4 further, which Your Honor would necessarily have to do to
5 grant summary judgment, which is not only to say, okay, you
6 possessed the gun during your encounter with the police, but
7 you would also have to find, Your Honor, again, on summary
8 judgment, that the Plaintiff pointed the gun at these
9 officers.

10 And you know, that's just impossible given this
11 record. Not only the witness -- the Plaintiff's testimony,
12 but you have officer testimony at the scene that they never
13 saw a gun, you have forensic information that reconstructs
14 the shooting and flatly lays out to Your Honor that Plaintiff
15 could have been in no position whatsoever other than running
16 away from them in order to sustain the injuries that he
17 sustained in his lower back, those bullet wounds. And my
18 colleague on the other side, defense counsel, is a very
19 capable lawyer, but one thing he's not is a doctor, nor is he
20 a forensic reconstructionist, nor is a police practices
21 expert. And you would need all of those things just to begin
22 to surmount the issues of disputed fact, the genuine material
23 issues of disputed fact and grant the Defendant's summary
24 judgment.

25 Now, talking to the point regarding the guilty

1 plea, it's a bit frustrating to hear defense counsel talk
2 about what his witnesses have said and actually embellish
3 upon what his witnesses have said in some respect but then
4 tell Your Honor there's nothing in the record to support
5 coercion. There's a lot in the record to support a coerced,
6 unfair, and erroneous plea of guilt. One you have the
7 witness -- the Plaintiff's very testimony, two, you have his
8 actions, which -- in which he appealed it. Two, you have
9 the -- three, you have the transcript that shows the colloquy
10 between him and the judge and his family was in the room and
11 they're making noise. And by the way, Your Honor, all this
12 is aptly laid out in the transcript in the testimony.

13 Additionally, Your Honor, you have the fact that
14 the very -- Plaintiff testified on pages 56 of his transcript
15 and 57 regarding the coercion that he was faced with, and he
16 even talked about his attorney. It wasn't me, Your Honor,
17 for Your Honor's edification. But on page 57, he's asked a
18 follow-up question and I'll note without any objection from
19 me. This goes on for pages where defense counsel's allowed
20 to ask him these questions. And one of the final questions
21 that he's asked is, so was it your testimony that you were
22 coerced into pleading guilty to having a gun by the Judge?

23 Again, their own question, Your Honor, says to
24 having a gun, not pointing a gun at the police, not having it
25 during the encounter, not anything to do with the facts of

1 this case, and the answer is, yes, I was coerced. I was
2 coerced by the lawyer. I filed ineffective assistance with
3 counsel and all of that. Yes.

4 So Your Honor doesn't have someone standing before
5 the Court for the first time saying that there was coercion
6 or challenging on conviction. You have someone that said it
7 at the hearing and on allocution, which Your Honor has plenty
8 of experience giving these. I'm sure my colleague on the
9 other side has read the transcript. I've done it. That was
10 a very tortured allocution, if you want to call it that.
11 I've never seen a gallery infect an allocution the way it did
12 in this time where you have friends and family and someone's
13 mother crying out from the galleries to tell them to take a
14 plea. I've never seen the sort of promises that were made in
15 this case. I've never seen someone faced with situation
16 appeal it then also obtain relief by way of the Appellate
17 Division.

18 So Your Honor doesn't just have someone in the
19 abstract saying for the first time at the end of a lawsuit
20 that they were coerced. Your Honor has his testimony, which
21 in and of itself is sufficient, Your Honor. It creates a
22 genuine issue of material fact. Then, you also have
23 supporting evidence that buttresses his statement.

24 Then defense counsel referenced the video. If Your
25 Honor hasn't watched the video, don't bother. It's at best

1 inconclusive, at worst shows the Plaintiff simply running.
2 It's a grainy video that shows the Plaintiff begin to run.
3 Now, obviously, the defense would want Your Honor to believe
4 that that video shows him pulling out a gun out of his
5 waistband, even though you can't see it on the video. But
6 again, that would also flip the standard for Rule 56 on its
7 head. You would have to, Your Honor, take all favorable
8 inferences in favor of the Defendant and look into that video
9 a gun.

10 But even if there was a gun, Your Honor -- and I
11 want to get this out there because I think it's important as
12 well -- Defendants, I think, have to argue that there was a
13 gun at the scene in order to justify this unjustifiable
14 shooting. But possession of a gun in and of itself is not
15 authority to use excessive force, Your Honor. This is a
16 highly, highly fact specific, only a jury can decide this
17 issue that needs to proceed internally can't be decided on
18 summary judgment. Even assuming arguendo that the Plaintiff
19 possessed a gun in his pocket and he sees the police and he
20 runs away, that doesn't permit them to shoot him,
21 particularly in his back as he's running away.

22 Even if I would go so far as to argue, Your
23 Honor -- and I'm not submitting that that's the case
24 here -- Plaintiff was running with a gun in his hand away
25 from the police. That's still not a license carte blanche

1 authority under our law to observe him running away, pull out
2 a gun, and shoot him in his back. And mind you, Your Honor,
3 while the defense picks and chooses what they want you to
4 believe from their testimony, make no mistake about it, the
5 Defendants can't agree on what happened. You have officers
6 saying, oh, I shot --

7 THE COURT: Mr. Aboushi, let me interrupt you for a
8 second. I want to ask you a question about something you
9 just said. Again, we're just assuming for purposes of the
10 motion, let's assume he did have a gun in his hand and was
11 running away from the two officers, Feely and Rosiello. It
12 seems to be Defendants' contention is perhaps they're running
13 towards the other officers. Now, if that were the case,
14 would your view be different that perhaps excessive force was
15 not so excessive after all if, in fact, he had a gun in his
16 hand and was running toward the other officers, the
17 nonshooting officers?

18 MR. ABOUSHI: Thank you for that question, Your
19 Honor. So I haven't heard the defense arguing, and it's
20 nowhere in their papers that he had a gun in his hand and he
21 was running towards these other officers. From what the
22 evidence shows, Your Honor, there were officers on the
23 sidewalk, there -- and there was an officer in the street,
24 and when Plaintiff was running, he was running away from both
25 where the officers in the street were and the officer on the

1 sidewalk was. He was running in the opposite direction. So
2 we don't even have a situation here where there's a realistic
3 threat that he has a gun in his hand -- again, which is not
4 something the Plaintiff concedes or is even undisputed in
5 this case, but let's --

6 THE COURT: Understood.

7 MR. ABOUSHI: -- just play some hypotheticals. He
8 has a gun, he's running, and he's not running in the
9 direction of any officer, Defendants would still be wrong.
10 And here in this case, that's exactly what it shows. And I
11 think the shooting reconstructionist is very, very valuable,
12 Your Honor, in addition to the medical expert reports, which
13 show the location of the injuries. You don't get those
14 injuries unless you're shot in the back. And it lines up
15 with exactly the way the Plaintiff testified to and Your
16 Honor -- and the way the Defendants testified to.

17 If you look at the expert reports, these aren't
18 one-sided expert reports that, you know, some hacks are paid
19 to write. These are expert reports that take into account
20 the mutual evidence at the scene, forensic evidence, for
21 example, location of shell casings and other things, and they
22 take into account what the Defendants said happened. So
23 putting all that together, Your Honor, it shows that the use
24 of force was improper, that they did not have probable cause
25 to arrest him, and under no circumstances were they entitled

1 to shoot him in his back as he ran away from them.

2 Next, Your Honor, in terms of -- I think my
3 colleague next talked about qualified immunity for a brief
4 moment, the law is well established about the usage of
5 excessive force and the use of deadly force. So that the
6 Supreme Court recently came out with decisions a few months
7 ago -- I don't know what they were because it wasn't
8 referenced -- does not change the fact that, you know, use of
9 excessive force is clearly established, shooting someone
10 who's running away from the police and/or unarmed is also
11 clearly established.

12 I don't see the Defendant's arguing that nor could
13 they because there's been plenty examples in the city of New
14 York where you have unarmed individuals or people running
15 away from police have been shot in the back, and those -- I
16 believe those lawsuits were able to proceed. And I can't
17 think of the case off the top of my head, but I do remember
18 reading at least one.

19 Now, in terms of Marshall, the disgraced security
20 officer/auxiliary police officer that the Defendants
21 referenced in trying to manufacture an argument for -- let me
22 see what it was -- selective knowledge. So first, Your
23 Honor, that doctrine's inapplicable. But even if the
24 Defendants are able to convince Your Honor to say, okay, you
25 should at least undergo this analysis, that analysis fails

1 because they failed to show that anyone other than Diab spoke
2 to Marshall.

3 Under the collective knowledge doctrine, the
4 officers have to speak and communicate with each other. That
5 didn't happen here. The only person in the record that may
6 have spoken with Marshall was Diab. And guess what, Diab
7 wasn't one of the people that shot the Plaintiff. So in
8 terms of probable cause and the collective knowledge
9 doctrine, I think that fails.

10 Next, Your Honor, is the failure to intervene.
11 Again, you would have to accept the Defendants' version of
12 events completely however absurd they are -- and I'll get to
13 that in a minute -- as true in order to grant summary
14 judgment on this claim. The reason why I say however absurd
15 is because now defense counsel -- and again, I know he's
16 doing the best he can, but defense counsel is now telling
17 Your Honor what he thinks his deponent said because his own
18 witness testified in a manner that precludes summary judgment
19 on this claim to intervene. Their witnesses testified about
20 30 seconds about 2 minutes. This isn't the Plaintiff. This
21 is their witnesses that are testifying to it.

22 So Your Honor can -- is not in a position to rule,
23 and I respectfully submit it would be improper to grant
24 summary judgment on this without the fact finder having heard
25 the testimony, observed the witnesses, looked at the

1 evidence, and decided whether or not -- how long the shooting
2 occurred. And again, they would have to think that their own
3 officers were wrong in what they testified to. It almost
4 reminds of our -- the argument we made about the bullet that
5 makes a U-turn because that's the only way that what they're
6 saying is true and Plaintiff can be shot in the back.

7 Well, this is the same sort of thing with the
8 testimony regarding intervention. You would have to reverse
9 engineer the Defendants' own testimony to truncate the amount
10 of time the shooting took place in order to grant summary
11 judgment on the failure to intervene.

12 Additionally, Your Honor brought up some questions
13 regarding how to intervene and then opportunities to
14 intervene. Clearly, these officers were within distance of
15 each other. They saw each other. I believe Anderson was
16 standing on the sidewalk with another officer. All of these
17 officers could've intervened in a bunch of ways. And I went
18 over this in their depositions, Your Honor. This isn't news
19 to anyone. They could have verbally instructed each other
20 not to shoot just like some of the other officers on the
21 scene did not discharge their weapon, right? Allegedly you
22 have this guy running down the street, pointing a weapon at
23 police officer, and only two officers out of, I believe, six
24 or seven on the team fire, right?

25 So whether or not they had an opportunity to

1 intervene, what they could've done to intervene, including
2 giving verbal commands, including the officer who's standing
3 next to -- one of the shooters could've put his hand on his
4 shoulder or said something to him or something else. All
5 these are within the province of a jury, Your Honor, and it
6 is not ripe for summary judgment.

7 THE COURT: Mr. Aboushi, question -- and some of
8 this is a question I asked your friend on the other
9 side -- does timing matter whether it was 20 seconds boom,
10 boom, boom or 2 minutes in terms of the duration of the
11 shooting? Does it make a difference on their motion for
12 failure to intervene? In other words, if it were only a
13 matter of seconds, would that have precluded these other
14 officers from intervening? Whereas if it were two minutes,
15 they probably had a better chance to intervene. Is that
16 something the Court needs to focus on, the timing, or does it
17 not matter?

18 MR. ABOUSHI: Well, I think on this disputed
19 record, Your Honor, you're required to deny summary judgment
20 on this because the jury needs to determine the time. I do
21 think that time matters, Your Honor. If it was a split
22 second, then I think under the law, the officer wouldn't have
23 an opportunity to intervene, right? And I think that's
24 fairly straightforward, and I'm willing to concede that part
25 of the hypothetical.

1 But we don't have that here, Your Honor. We need
2 the jury to sit down and say, okay, was this a two -- did
3 this occur over 2 minutes; did this occur over 30 seconds,
4 which frankly is still enough time to intervene. And if it
5 did occur 30 seconds or 2 minutes as they say, was there a
6 meaningful opportunity to intervene with the officers
7 standing around their fellow officers who were shooting at an
8 individual who was running away with them and we submit was
9 unarmed?

10 So you know, your question and your point is well
11 taken, Your Honor. I think if it was a split-second
12 decision, a split-second event, I think that does not
13 implicate failure to intervene. I don't even think we get
14 that far down the hypothetical, Your Honor, because of the
15 disputed facts that require a jury to really determine what
16 happened, who was where, what opportunity did they have, who
17 was in who's line of sight. These are the sorts of the
18 things that I think the jury will focus on in the failure to
19 intervene.

20 THE COURT: Okay. Understood. All right. Go
21 ahead.

22 MR. ABOUSHI: Thank you, Your Honor. Next, you
23 know, I wrote down the word typical when my colleague on the
24 other side was speaking because I don't think any failure to
25 intervene case is typical. IT may be typical in his

1 experience, but failure to intervene cases run the gamut from
2 police shootings to police beatings to police chases, all of
3 those situations. So I would not -- I would vehemently
4 disagree with the characterization that in a police shooting,
5 there's never an opportunity to intervene, and certainly no
6 claim for failure to intervene can lie in a police shooting
7 case. That's just not true, Your Honor.

8 And then, I believe the next point that was raised,
9 Your Honor, is the Monell argument. I think defense counsel
10 does a good job of seeking to minimize the record as to the
11 Monell claims, but the facts are the facts, Your Honor. And
12 this Court has been very clear in terms of what it takes to
13 attach Monell liability, and frankly, there's more than
14 necessary here to attach Monell liability.

15 We have, first and foremost, officers who are
16 involved in lawsuits that, one, either don't know about them
17 or -- more devastatingly for the Defendant -- they're not
18 memorialized. How can you supervise and monitor your
19 officers when you don't know when they're being sued and no
20 one's keeping track? We also understand that possibly both
21 but at least one of the shooters should have been in a
22 program to monitor their performance strictly on metrics
23 basis. That didn't happen.

24 You also had the number of complaints against these
25 officers that are in and of themselves, Your Honor, to

1 inspire Monell liability and at the very minimum put it
2 before a jury and have a jury decide that when these officers
3 qualify for an early intervention program, have a certain
4 amount of complaints lodged against them, have a -- are
5 involved in a certain amount of lawsuits, should these
6 officers have been on the street that night? Should these
7 officers have received additional training? Should these
8 officers have received additional supervision?

9 The bar for Monell is not as high as my colleague
10 on the other side would suggest. And I'm looking for the
11 case now -- I believe you cited it -- but it seems recently
12 out of the Eastern District -- and I believe it was Judge
13 Dearie that wrote it -- upholding and denying summary
14 judgment for a Monell claim and sending it to the jury -- the
15 case settled, but where an officer had less complaints than
16 the officers we have here, there were less lawsuits than the
17 officers that we have here, and none of the officers in that
18 case were subject to increased monitoring, which the officers
19 in this case should have been subject to.

20 Then finally maybe defense counsel ran out of
21 steam. I don't blame him. This is all the argument. But I
22 heard some things but not much about assault and battery and
23 state law claims. Clearly, Your Honor, the use of excessive
24 force dovetails from an assault and battery. The Plaintiff
25 testified as to the elements of those claims. Obviously,

1 there was contact made with the Plaintiff. The Defendants
2 shot him. He was conscious of that. He did not consent to
3 it. He was put in imminent fear by the officers pulling out
4 their guns, pointing at them and then shooting him. And so I
5 believe that addresses the arguments raised by the
6 Defendants.

7 And Your Honor, in closing, I just would like to
8 say that the parties could not be further apart on what
9 happened in this case, and I think that's why summary
10 judgment gets denied and it moves to a trial. You have the
11 Plaintiff's testimony. You have the Defendant's testimony
12 that supports what the Plaintiff says and goes against what
13 some of the other officers are saying. You have forensic
14 testimony, Your Honor, that analyzes the forensics at the
15 scene, analyzes the testimony. And according to the science,
16 according to cold science establishes what the Plaintiff has
17 been saying: I was shot in the back as I was running away.

18 And so in light of the foregoing, Your Honor, we
19 respectfully request that Your Honor report and recommend
20 that the motion for summary judgment should be denied. And I
21 really thank Your Honor for taking the time to have us today
22 and to also ask the important and thoughtful questions that
23 you have posed.

24 THE COURT: Mr. Aboushi, I do have another question
25 for you. Do you agree that your claims of excessive force

1 against the nonshooters, Anderson, Diab, Minucci,
2 Mitchel -- are you not pursuing those; is that correct?

3 MR. ABOUSHI: That's correct, Your Honor.

4 THE COURT: Okay.

5 MR. ABOUSHI: Anyone that did not use force, we
6 cannot establish claim of excessive force with.

7 THE COURT: I'm sorry. I missed that last part.
8 Could you say that one more time?

9 MR. ABOUSHI: I said anyone who did not use force
10 against the Plaintiff, we would not be able to establish a
11 claim for excessive force.

12 THE COURT: Okay. Understood. Mr. Kalmbach, I'll
13 give you the last word. Anything else you'd like to add on
14 your end?

15 MR. KALMBACH: Yes, Your Honor, just a few points
16 on Plaintiff's argument. First, I think just as a general
17 manner, what it sounds like is kind of happening right now is
18 that Plaintiff's starting to assert alternative theories of
19 liability here, whereas I would caution the Court against
20 allowing Plaintiff to now argue on the one hand that he never
21 had a gun, but then, if I did have a gun, then I wasn't
22 actually holding it at the time. Plaintiff cannot assert
23 alternative theories of liability, here. I just want to make
24 that point.

25 As to qualified immunity, I just wanted to

1 reiterate that in order for the Court to deny qualified
2 immunity, it would have to find a case at the Second Circuit
3 or higher that found excessive force under a
4 factually -- specifically, factually similar circumstances.
5 That's just kind of a small point. As Plaintiff was making
6 his argument, I looked through our papers, and I just want to
7 clarify that Officer Feely, my understanding is that he was
8 asked how much time elapsed between the first and last shot,
9 not between shots so just wanted to clarify that.

10 As to our Monell claim, I do just want to
11 reiterate, too, that these points about, like, performance
12 monitoring, things like that, they're just wrong. Even based
13 on Plaintiff's -- if you look at the documents that Plaintiff
14 attaches in support of his complaint -- for example, he
15 attaches a document, which purports to set the standards for
16 monitoring, and the Defendants just don't even meet that
17 here. So I wanted to clarify that.

18 And then, lastly, as to coercion, I'm not aware of
19 any case law that says that -- or that holds that these
20 circumstances rise to the level of coercion to invalidate a
21 plea agreement nor is there -- just the fact that Plaintiff
22 has appealed doesn't necessarily indicate that he appealed
23 based on some alleged coercion argument. So that's it for
24 the points as to our motion.

25 THE COURT: All right. Thank you. Mr. Aboushi, I

1 have another question for you. Mr. Aboushi, what do you want
2 the Court to consider? Do you want the Court to consider the
3 plea allocution or to disregard it or credit his testimony
4 that he did not have a gun or all of the above? In other
5 words, how do I reconcile the testimony now that he did not
6 have a gun with the testimony from the allocution? Or do I
7 not need to reconcile the two? How do address that
8 inconsistency?

9 MR. ABOUSHI: Well, Your Honor, just -- and to put
10 a period on something my colleague said, you know, in our
11 statement of fact and in our brief, it's clear that Plaintiff
12 did not point -- and I'm quoting Plaintiff, did not point at
13 anyone or present a gun to anyone. That's clear, right? So
14 this whole thing that we're asserting alternative theories is
15 just not true.

16 But to answer your question, Your Honor, I think
17 the fact that Plaintiff testified that he did not have a gun
18 and he was coerced, if this is sufficient to overcome the
19 Defendants' claims and put this before a jury. And the
20 allocution is -- I think buttresses that statement, but
21 that's up to Defendants to present to a jury, and the jury
22 can resolve what Defendants' claims are conflicting
23 statements because that's what really this comes down to,
24 Your Honor. The Defendants are saying, look, you said X and
25 you said Y, and in that situation, a jury needs to reconcile

1 that.

2 So I think there's more than ample evidence to show
3 the invalid -- that the plea of guilt is invalid as a result
4 of coercion, again, you have the appeal, you have the record
5 itself. But I don't think Your Honor needs to go that far in
6 terms of picking one over the other. I think the fact that
7 the question of fact remains, and there's more than enough
8 evidence to substantiate, at this stage, Plaintiff's claim
9 about coercion. I think Your Honor doesn't need to do
10 anymore heavy lifting on that.

11 THE COURT: Understood. But at the same time, as
12 you're aware, the Plaintiff himself cannot manufacture issues
13 of fact, right? In other words, the Plaintiff himself cannot
14 create inconsistencies to defeat summary judgment. Is it
15 your position -- if you're able to answer it, let me know, is
16 it going to be that he did not have a gun or did he have a
17 gun, or do you not know?

18 MR. ABOUSHI: Well, for what purposes, Your Honor?
19 Because in terms of the shooting --

20 THE COURT: Yeah.

21 MR. ABOUSHI: -- our position and the Plaintiff's
22 position is very clear. When he was shot by the police, he
23 did not have a gun, and he certainly --

24 THE COURT: Okay.

25 MR. ABOUSHI: -- didn't point a gun at any officer.

1 And I think that's critical, Your Honor, because like I said,
2 just possessing a gun in and of itself is not a license for
3 officers to shoot you. They have to, obviously, meet the
4 standard of threat and -- to themselves, imminent deadly
5 threat against themselves or another officer. And so you
6 know, respectfully, I would say that we're going a bit afield
7 on whether or not he possessed the gun because you still have
8 to go through a whole other analysis as to whether or not he
9 presented that gun to the police officers at the scene that
10 night, he pointed the gun at the officers that night and in
11 doing so caused a threat such that would justify the deadly
12 use of force against him.

13 And we would submit, Your Honor, whether or not he
14 had a gun is not dispositive of the second part of analysis
15 where he was running from the police and posed no threat to
16 them. And again, Your Honor, I think that the Plaintiff's
17 testimony, the Defendants' testimony, the forensics, the
18 doctors, the Monell expert, the evidence that Your Honor
19 could look at just by looking at crime scene photos and
20 location of items all tell you that even if, you know -- even
21 just putting aside whether or not he plead guilty to a gun,
22 the use of force that night was woefully unjustified.

23 THE COURT: Okay. Understood. Thank you for that.
24 What I want to do is go off the record for a minute. Hold on
25 one second.

1 (Off the record.)

2 THE COURT: Case number 17-cv-6457. We have
3 counsel for both parties on the line. We went off the record
4 for a minute. The Court wanted to inquire -- ask for any
5 recent summary discussions. We are back on the record now.
6 The Court will take the motion under advisement and rule
7 quickly. Is there anything else we need to address for
8 Plaintiff today, Mr. Aboushi?

9 MR. ABOUSHI: No, Your Honor. Thank you for your
10 time and attention.

11 THE COURT: Okay. Anything else for Defendant, Mr.
12 Kalmbach?

13 MR. KALMBACH: Yes, one procedural matter, Your
14 Honor. Plaintiff filed this letter yesterday, eight months
15 after the motion was fully briefed. I guess I'm just
16 wondering what Your Honor would prefer. Can we respond to
17 that? Should we respond to that?

18 THE COURT: It's up to you. If you want to
19 respond, feel free to respond. If you're going to respond,
20 how much time do you think you'll need?

21 MR. KALMBACH: Three days, Your Honor, would be --

22 THE COURT: Okay. So if you're so inclined, you
23 can file a response by July 28th, okay?

24 MR. KALMBACH: Thank you, Your Honor.

25 THE COURT: All right. With that, we are

1 adjourned. Have a nice day, everyone.

2 MR. KALMBACH: You, too.

3 MR. ABOUSHI: Thank you, Your Honor.

4 THE COURT: Bye.

5 (Proceedings adjourned.)

6
7 TRANSCRIBER'S CERTIFICATE

8 I certify that the foregoing is a correct
9 transcript from the electronic sound recording of the
10 proceedings in the above-entitled matter.

11
12 July 29, 2022

13 *Natalie C. Webb*

14 _____
15 Natalie C. Webb

DATE

16 Legal Transcriber
17
18
19
20
21
22
23
24
25